Chinadotcom Corp v E Planet Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S-23-85 OF 2002
ABDUL WAHAB J
6 MAY 2003

Civil Procedure *— Jurisdiction — Foreign proceedings — Whether plaintiff's application for injunction against foreign proceedings allowed*

The plaintiff, a company incorporated in the Cayman Islands made an application for an injunction to restrain the first defendant from proceeding with a winding up petition in Cayman Islands and also sought an order that the first defendant should file their case in Malaysia and be bound by the Hong Kong law. The issue for determination was whether the plaintiff's application for an injunction against foreign proceedings was allowed.

Held, dismissing the application:

It is an established rule that extreme and considerable caution must be exercised in injuncting foreign proceedings. The rule is based upon the obvious consideration that enforcement of any such order may be impractical. The law applicable to the winding up of a company is the law creating that company as a legal entity. In the case of the plaintiff, that law was the company law of the Cayman Islands. The only court authorized in the case of the winding up of the plaintiff under the company laws of the Cayman Islands was the Grand Court of the Caymans. Whether the winding up proceedings was to be stayed was, therefore, a matter for the Grand Court of the Caymans to decide. The complete relief under a winding up of the plaintiff was available only in the proceedings in the Caymans, not in Malaysia under Hong Kong law. Thus, it would be wrong to injunct winding up proceedings commenced and undertaken in the Cayman Islands (see pp 631H–632C).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat yang ditubuhkan di Cayman Islands telah membuat satu permohonan untuk satu injunksi untuk menghalang defendan pertama daripada memulakan satu petisyen penggulungan di Cayman Islands dan juga memohon satu perintah bahawa defendan pertama hendaklah memfailkan kes mereka Malaysia dan terikat dengan undang-undang Hong Kong. Persoalan untuk ditentukan adalah sama ada permohonan plaintif untuk satu injunksi terhadap prosiding negara asing dibenarkan.

Diputuskan, menolak permohonan tersebut:

Ia adalah rukun tetap bahawa perlu ada amaran dan pertimbangan sewajarnya dalam menginjunksikan prosiding negara asing. Rukun tersebut adalah berdasarkan pertimbangan nyata di mana

penguatkuasaan apa-apa perintah sedemikian tidaklah praktikal. Undang-undang yang terpakai terhadap penggulungan satu syarikat adalah undang-undang yang membentuk syarikat tersebut sebagai satu entiti yang sah, Dalam kes plaintif, undnag-undnag tersebut adalah undang-undang Cayman Islands. Satu-satunya mahkamah yang diberi kuasa dalam kes penggulungan plaintif di bawah undnag-undang syarikat Cayman Islands adalah Grand Court di Caymans. Sama ada prosiding penggulungan tersebut akan digantung adalah, oleh demikian, perkara untuk diputuskan oleh Grand Court di Caymans. Relief di bawah satu penggulungan plaintif hanya boleh diperolehi dalam prosiding di Caymans, bukan di Malaysia di bawah undang-undang Hong Kong. Oleh itu, ia adalah salah untuk menginjunksikan prosiding penggulungan yang telah bermula dan dikendalikan di Cayman Islands (lihat ms 631H–632C).]

Notes

For cases on foreign proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2001) para 2713.

Cases referred to

British Airways Board v Laker Airwavs & Barclays Bank [1985] AC 58 (refd)

Mc Henry v Lewis (1882) 22 ChD 397 (refd)

Renu Zechariah (*Cheryl Kwan* with her) (*Raslan Loong*) for the plaintiff.

L Sabapathy (*Peter Yap*, *Tharminder Singh* and *GS Leow* with him) (*Logan Sabapathy & Co*) for the defendants.

Abdul Wahab J: The plaintiff is a company incorporated in the Cayman Islands. It is publicly listed in the New York Stock Exchange. The first fefendant is a company; and the second defendant is a shareholder of the first defendant, a company. The first defendant has filed a winding up petition against the plaintiff in the Cayman Islands. The plaintiff is seeking an injunction to restrain first defendant from proceeding with the winding up petition in Cayman Islands. More particularly, the plaintiff is seeking by its application at encl 6:

(i) an injunction to restrain the first defendant from proceeding with the winding up petition;

(ii) if the court allows (i), plaintiff is seeking a mandatory injunction against the first defendant to withdraw its winding up petition in the Cayman Islands against the plaintiff to be withdrawn; and

(iii) plaintiff is also seeking an order that the first defendant should file their case in Malaysia and be bound by the Hong Kong law.

The first defendant alleges the winding up petition in the Cayman Islands against the plaintiff is filed based on an undisputed debt within the laws of

A Cayman Islands. The first defendant's statutory demand was properly served under the Cayman Islands laws. The plaintiff here has submitted to the jurisdiction of the Cayman Islands court, participated in the Cayman Islands proceeding and obtained relief there. The petition as well as plaintiff's application to strike out is still pending. The plaintiff's submission to the jurisdiction and participation in the Cayman Islands proceeding was B without any reservation, and what the plaintiff is now seeking in the Malaysian court an anti-suit injunction which is rarely given because although the injunction is in personam against the party here, it will inevitably interfere with the proceeding in the Cayman Islands.

After hearing the parties upon the application at encl 6, the application C was dismissed with costs.

The grounds for the dismissal of the application at encl 6 are as follows:

(i) On 2 November 1999, a share sale and purchase agreement was entered into between the defendants as sellers and 24/7 Media Asia Limited as buyer. The issue of shares in the plaintiff company would D pay for the purchase. The plaintiff signed the agreement as a party. It undertook at the very least a contingent obligation to issue and transfer shares in payment to the defendants for the transaction. Whether it is a seller is irrelevant. It was a participating party to the transaction, without whose participation the transaction might fail to materialize. E

(ii) Upon failure by the plaintiff to issue shares as it undertook under the agreement, the plaintiff could have been sued. Indeed dealing with the contingency of being sued for breach of the agreement, the parties have agreed that the forum in the event of any dispute is in Malaysia and the laws should be the laws of Hong Kong. F

(iii) No effort has been made in this case to show what is the relevant law in Hong Kong. On that ground alone, the plaintiff's application should be dismissed since onus of proving the Hong Kong law is upon the plaintiff.

(iv) A winding up action is a statutory right related to the question of G ability to pay, and not an issue of liability under the agreement between the parties in this case. The provision under the agreement for venue in Malaysia and applicability of Hong Kong law cannot, therefore, be a basis to prevent the taking up of winding up proceedings in the Cayman Islands.

H (v) The plaintiff's application seeks an injunction against foreign proceedings. It is an established rule that extreme and considerable caution must be exercised in injuncting foreign proceedings: *Mc Henry v Lewis* (1882) 22 ChD 397. The rule is based upon the obvious consideration that enforcement of any such order may be impractical.

(vi) The law applicable to the winding up of a company is the law creating I that company as a legal entity. In the case of the plaintiff, that law is the company law of the Cayman Islands. Indeed the only court authorized in the case of the winding up of the plaintiff under the

company laws of the Cayman Islands is the Grand Court of the Caymans. Even assuming that the question whether the defendants were right to convert the share values and on what terms in the transaction under 2 November 1999 agreement is properly a matter to be heard in Malaysia under Hong Kong law, and assuming further that the plaintiff is liable for the failure to issue shares, the winding up action against the plaintiff itself can only be proceeded with in the Grand Court of the Caymans. Whether the winding up proceedings is to be stayed is, therefore, a matter for the Grand Court of the Caymans to decide. The complete relief under a winding up of the plaintiff is available only in the proceedings in the Caymans, not in Malaysia under Hong Kong law. Thus, it would be wrong to injunct winding up proceedings commenced and undertaken in the Cayman Islands (see *British Airways Board v Laker Airways & Barclays Bank* [1985] AC 58).

The plaintiff's application was, therefore, dismissed with costs.

Application dismissed.

Reported by Ezatul Zuria Azhari